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No. 86-71

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

CTS CORPORATION,

Appellant,

v.

DYNAMICS CORPORATION OF AMERICA,

Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF APPELLANT CTS CORPORATION IN OPPOSITION TO MOTION TO AFFIRM

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I. INTRODUCTION.*

The Motion To Affirm ("Motion") of Dynamics Corporation of America ("DCA") is pervaded with central analytic flaw of the decision below -- namely, that because the Indiana Control Share Acquisition Chapter may make the acquisition of shares in an Indiana corporation less attractive as an economic proposition to a prospective tender offeror, the Chapter therefore "conflicts" with the Williams Act and violates the Commerce Clause. Like the Seventh Circuit, DCA ignores the fundamental differences between the Indiana statute and the Illinois statute considered in Edgar v. MITE Corp., 457 U.S. 624 (1982), and substitutes speculation about "economic impact" for analysis of the Constitutional question presented -- whether the States have the authority, in our

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*Rule 28.1 Listing: Information set forth in the Jurisdictional Statement of Appellant CTS Corporation at 1 n.1.

Federal system, to define the voting rights of shares of their domestic corporations, so long as they do not discriminate against interstate commerce. Far from demonstrating the appropriateness of summary affirmance, DCA's Motion highlights the need for plenary review.

II. DCA'S DISTORTIONS OF FACT AND LAW.

DCA's assertions that this case is "unique" and that the District Court's decision "was limited to the particular facts of this case," Motion at 25, are completely disingenuous. The Seventh Circuit's opinion, like the District Court's second (Commerce Clause) opinion, holds the Indiana statute unconstitutional on its face. It is frivolous to suggest the Chapter has any valid application under the Seventh Circuit's decision.

Equally disingenuous are DCA's references to "evidence," the statute's

"practical effect" on interstate commerce, and the "limited and fact-intensive nature" of the Seventh Circuit's analysis. E.g., Motion at 14, 15, 24. There is no factual record in this case. The District Court refused even an opportunity for an evidentiary hearing. CTS Juris. St. at 6 n.5. Like the Seventh Circuit, DCA substitutes armchair theorizing and selective law review articles for record evidence.[1]

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[1]DCA repeatedly asserts that the Indiana statute is a "weapon" to defeat tender offers, and is "completely controlled by management." E.g., Motion at 4-6, 7-8, 19-20. In fact, the statute gives the decision whether to accord voting rights to control shares to disinterested shareholders, and excludes management. There is also no evidentiary basis for DCA's claim that the process is "controlled by management," and the statute itself gives management no opportunity to manipulate the process. The shareholder vote must be held within 50 days of receipt of the acquiring person statement; management must give prompt notice of the shareholder meeting; and the notice must include both the acquiring person's statement and a statement by the

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DCA also contends this case is MITE revisited, ignoring the patent differences between the two statutes. In the name of protecting Illinois shareholders being asked to tender their shares, the statute in MITE forbade a non-Illinois tender offeror from purchasing shares from other shareholders throughout the Nation, thus directly regulating transactions between wholly out-of-State parties. It also applied to tender offers for shares of non-Illinois corporations, thus presenting the risk of multiple and inconsistent regulations imposed upon tender offerors

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board of directors. IND. CODE ANN. § 23-1-42-7(b), -8 (Burns Cum. Supp. 1986). Nor does the Chapter prevent additional communications by the acquiring person to shareholders. Finally, if tender offers in fact benefit all shareholders in the corporation as DCA contends, Motion at 21-22, then one would expect the shareholders to vote for the offeror and thus facilitate hostile takeovers.

by the laws of different States. Neither is true of the Indiana statute. The Chapter applies only to Indiana corporations and it does not forbid any transactions at all, either between out-of-State parties in interstate commerce or otherwise. Rather, it regulates the post-acquisition voting power of certain shares, whether acquired in a tender offer or otherwise.[2]

[2] DCA also ignores these fundamental features of the Indiana statute in its erroneous effort to bring this case within the scope of some post-MITE lower court decisions. While some courts have struck down laws labeled "control share acquisition statutes," those statutes made the acquirer's right to purchase shares dependent on shareholder approval, and thus operated to prohibit transactions nationwide. E.g. Fleet Aerospace Corp. v. Holderman, 796 F.2d 135 (6th Cir. 1986); APL Limited Partnership v. Van Dusen Air, Inc. 622 F. Supp. 1216 (D. Minn.), vacated and appeal dismissed, Nos. 85-5285/5286MN (8th Cir. Nov. 26, 1985); Icahn v. Blunt, 612 F. Supp. 1400, 1414-20 (W.D. Mo. 1985). Indiana's statute regulates only voting rights and has utterly no effect on

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DCA also ignores this Court's divisions in MITE. It cites all portions of Justice White's opinion as a majority opinion, when in fact only Part V-B garnered five votes. For example, when DCA claims this Court "exhaustively examined the legislative history of the Williams Act," Motion at 9, the cited passage represents the views of only three Justices. Similarly, in contending that the Williams Act's so-called "policy of neutrality" not only avoids "tipping the balance" as a matter of Federal law but also preempts any State law that may affect the supposed "balance," DCA merely dismisses the contrary view, articulated

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an acquirer's ability to purchase shares. The court in APL recognized the importance of this distinction, stating that the voting power of control shares "once the shares have been acquired may well be a proper subject of state regulation." 622 F. Supp. at 1223-24 (emphasis in original).

by Justices Powell and Stevens and reserved by Justice O'Connor (whose votes were essential to the judgment in MITE), as an "inverted view of federalism." Motion at 11. These divisions in MITE have created uncertainty in the lower courts even as to statutes that, like the one in MITE and unlike the one here, do regulate the purchase of shares in tender offers. See CTS Juris. St. at 9-10.

III. DCA'S "CONFLICT" BETWEEN STATE AND FEDERAL LAW IS NON-EXISTENT.

DCA's purported "conflict" between the Williams Act's timing provisions for tender offer purchases and the Indiana statute's timing for a shareholder vote on control share voting rights does not exist. The State statute places no limitation on the offeror's ability to purchase. Apart from its defective premise, DCA also ignores that the Williams Act 20 business day (circa 28

calendar day) waiting period is only the minimum period during which tender offers must be kept open. 17 C.F.R. § 240.14e-1(a) (1986). Even if a tender offeror volitionally decides not to purchase shares until after the shareholder vote under the Indiana statute, it can compel that vote to occur within the permissible Williams Act period. The Chapter presents no threat of the indefinite or "extended delay" the plurality found troublesome in MITE.

Indeed, as the State of Indiana explained, a tender offeror can structure its offer so as to purchase shares after the Williams Act's minimum waiting period and without "risk" concerning the voting rights of shares it may acquire. Indiana Juris. St. at 40-46. Finally, if the only constitutional defect were the supposed "conflict" between a 28 day minimum period

for purchasing shares and a 50 day maximum period for the shareholder vote on voting rights, the State could easily repair that minor statutory detail. Instead, it is confronted with a sweeping Seventh Circuit opinion that invalidates any State law regardless of this "timing" issue.[3]

[3]DCA also claims its compliance with Indiana law would have been "futile" or "impossible" because, given the interplay among the timing of its partial tender offer, its proxy fight and CTS's election to be governed by the new Indiana Business Corporation Law, DCA could not vote all the shares it wanted to at the 1986 annual meeting. See Motion at 3, 9, 13. Apart from the fact that DCA could have structured its tender offer to achieve its objectives, see Indiana Juris. St. at 40-44, the entire argument is beside the point. DCA's "strategy" in a particular takeover battle is not entitled to constitutional priority over State law. Its argument rests on the novel -- and false -- assumption that it has some "Federal right" immediately to vote shares acquired in a tender offer. But State law governs shareholder meetings and voting rights -- and may provide, for example, that only shareholders of record 30 or 60 days before a meeting may vote. See, e.g., IND. CODE § 23-1-29-7 (Burns Cum. Supp.

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IV. DCA'S COMMERCE CLAUSE THEORY IS UNPRECEDENTED.

DCA concedes, as it must, that the Indiana statute regulating shareholder voting neither is limited to tender offers nor facially discriminates against interstate commerce. Motion at 6-8, 16. It therefore makes an attenuated "disproportionate impact" argument, supposedly showing a "discriminatory effect" on interstate commerce. DCA claims first that the burden of the Indiana statute "falls" most heavily "on tender offerors," and then that "the large majority of tender offers for Indiana corporations will come from out-of-state bidders and will be addressed to a sizeable majority

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1986) (record date may be 70 days before meeting). DCA's desire in this case to vote its shares at a particular time adds nothing to its preemption claim. Nor was that the basis of the Seventh Circuit's decision.

of out-of-state shareholders." Id. at 6-8, 15-16.

Even were these assumptions supported by record evidence (and they are not), this "disproportionate impact" theory has no foundation whatever in this Court's Commerce Clause jurisprudence. DCA's contention that this case is "no different from numerous decisions of this Court under the Commerce Clause striking down facially neutral regulations as disproportionally [sic] affecting out-of-state parties and impeding the flow of interstate commerce," Motion at 16, is accompanied by a single citation -- Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (facially neutral regulation of train lengths). But Southern Pacific (like other transportation requirement cases) turns on the problem of multiple and conflicting State law burdens on interstate commerce. Southern Pacific

repeatedly emphasized the need for national "uniformity" and the "confusion and difficulty" that would result from conflicting State laws on train lengths. 325 U.S. at 770-71, 773-75. In this case, by contrast, one State's law must govern matters such as voting rights and shareholder approval of fundamental corporate changes. Since the Control Share Chapter applies only to Indiana corporations, there is no risk of multiple and conflicting burdens.[4]

DCA's reliance on Hughes v. Oklahoma, 441 U.S. 322 (1979), further highlights the flaw in its "discrimination" argument. In Hughes, a State statute

[4]DCA's reliance on Brown-Forman Distillers Corp. v. New York State Liquor Authority, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986), is similarly misplaced. The State law in Brown-Forman regulated prices in wholly out-of-State transactions and plainly created a risk of multiple and conflicting burdens.

prohibited only the interstate sale of minnows and thus discriminated on its face against interstate commerce. But if the statute had instead prohibited any sale of minnows -- whether interstate or intrastate -- the mere fact that Hughes was from out-of-State could not have given him special privileges over State residents. As Justice Holmes explained long ago: "A man cannot acquire a right to property by his desire to use it in commerce among the States." Hudson County Water Co. v. McCarter, 209 U.S. 349, 357 (1908). Similarly here, the Control Share Chapter applies equally to interstate and intrastate acquisitions of the shares of Indiana corporations.

Similarly flawed is DCA's claim (citing MITE) that the Indiana statute "directly regulates" interstate commerce. Motion at 17-18. Unlike the statute in MITE, the statute here does not regulate

the purchase of shares or any other transaction in interstate commerce. This Court has never held that a statute "directly regulates" interstate commerce merely because it has some extra-territorial effects. Few if any State statutes -- and certainly no State corporation statutes -- could survive such a test. So long as the State allows out-of-State residents to own shares in its State-chartered corporations (as it constitutionally must), then any State corporation law regulating shareholder voting rights or any other internal corporate relationship will necessarily have extra-territorial effects. Like all such statutes, the one here merely defines the State-created property rights available for sale in intrastate and interstate commerce alike.

Finally, DCA's claim that the Indiana statute excessively "burdens" interstate

commerce simply perpetuates the Seventh Circuit's central error about the "interstate market for corporate control." DCA cannot deny (and so ignores) that this market exists only to the extent that State laws have created and defined the shareholder rights available for sale. Nothing in this Court's precedents requires the States to define property rights in particular ways, and nothing in the Constitution requires Indiana law inextricably to link voting rights to all other shareholder rights.[5] Absent

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[5]DCA's stress on the importance of shareholder voting rights, e.g., Motion at 7 & n.5, is quite ironic, since State law is the source of all such rights. The "one-share, one-vote" rule, for example, is neither universal nor constitutionally required. See Providence & Worcester Co. v. Baker, 378 A.2d 121, 123 (Del. 1977) (at common law each shareholder had one vote regardless of number of shares owned). Nothing in the Constitution prohibits a "one-shareholder, one vote" rule even if it might make it more difficult for tender offerors to acquire control of corporations.

discrimination against interstate commerce, the Commerce Clause does not protect "the particular structure or methods of operation" in a market, however familiar they might be. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127 (1978). Indeed, DCA's "interstate market for corporate control" theory is a thinly disguised variation on the "novel suggestion," rejected in Exxon, that "because the economic market for petroleum products is nationwide, no State has the power to regulate the retail marketing of gas." 437 U.S. at 128.[6]

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[6]DCA's attempt to distinguish Exxon, Motion at 21 n.11, is absurd. The burden of the State law in Exxon fell "solely on [out-of-State] companies." 437 U.S. at 125 (emphasis added). Yet such effects were not unconstitutional because there was no discrimination against interstate commerce per se. Id. at 126 & n.16. Similarly, the Control Share Chapter does not discriminate against interstate commerce, even if there were evidence (i)

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DCA weakly contends the decision below will not Federalize corporation law because tender offers "involve extensive interstate commerce more certainly than other corporate activities," and "state regulation of tender offers is neither as developed nor as engrained as other areas of state corporate law." Motion at 23-24. This argument has no basis in Commerce Clause jurisprudence and also ignores the very core of the Seventh Circuit's decision. That Court concluded that the State's regulation of shareholder voting rights -- a matter as "deeply

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that its burden "falls most heavily" on tender offerors, and (ii) that the "majority" of tender offerors will be out-of-State companies. DCA's contrary Commerce Clause theory would lead to the invalidation of countless State statutes.

engrained" as <u>any</u> "area of state corporate law" -- is unconstitutional because it makes tender offers economically less attractive. By that reasoning, <u>any</u> State corporation law that makes a corporation a less attractive takeover target is constitutionally suspect. Moreover, the suggestion that tender offers "involve extensive interstate commerce more certainly than," for example, a merger, a sale of assets, or a proxy fight, is both unsupported in the record and ridiculous.

IV. CONCLUSION.

This case squarely presents the question whether States are constitutionally forbidden from enacting generic corporation laws that may have the effect of making their domestic corporations less attractive as hostile takeover targets. That question is important; is not

controlled by this Court's prior decisions; and merits plenary review.

Respectfully submitted,

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